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NO. 71 - 412

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Supreme Court of the United States

October Term, 1971

MICHAEL VINCENT CATALANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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NO. .....

MICHAEL VINCENT CATALANO,

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Michael Vincent Catalano, prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to review its judgment affirming the judgment of the United States District Court for the Southern District of California sentencing petitioner to imprisonment after a trial by jury and a verdict of guilty on a one-count indictment for perjury in violation of 18 U.S.C. § 1621.

The charge of perjury arose from petitioner's answers to nineteen questions propounded to him before the federal grand

jury in San Diego County on or about September 18, 1968 (C.T.[1] 1-4.) On May 21, 1970, the petitioner pleaded not guilty to the charge, and thereafter filed written motions to dismiss, for discovery and inspection, and for bill of particulars (C.T. 10-23). All motions were denied (C.T. 28). Petitioner's trial by jury commenced on or about October 22, 1970 (C.T. 32; R.T. 25), at the conclusion of which (October 26, 1970) he was found guilty of perjury as charged in the indictment (C.T. 52; R.T. 354). Thereupon, petitioner moved for a new trial and for judgment of acquittal notwithstanding the verdict. After argument on November 30, 1970, the motions were denied (R.T. 366).

On November 30, 1970, petitioner was sentenced to three years in the custody of the Attorney General; Notice of Appeal was filed; and bond on appeal was fixed at $25,000. The bond was posted and petitioner was released on bail.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, consisting of a one-page *per curiam* decision, was filed on August 6, 1971. A copy of said opinion is attached hereto as an appendix.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The date of the judgment sought to be reviewed and the

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1 As used herein, "C.T." refers to the Clerk's Transcript and "R.T." to the Reporter's Transcript.

time of its entry is August 6, 1971 (see appendix).

2. Timely filing of a Petition For Rehearing was denied on August 24, 1971.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner denied due process of law and constitutional rights when he was not permitted to be represented by an attorney within the grand jury room while being interrogated?

2. Does the decision of the Ninth Circuit Court of Appeals conflict with decisions of other federal courts with respect to the following questions raised below, and is that decision adequate by reason of the court below disposing of these questions merely by stating "we find the testimony was material" and "[w]e find other points raised without merit"?

   a. Whether the trial court was in error in instructing the jury that all questions asked of petitioner at the grand jury hearing were material but in not instructing it which questions pertained to the charges of falsity?

   b. Whether the trial court erred in not requiring the jury to find specifically which statements of petitioner it found to be perjurious?

   c. Whether the evidence was sufficient to support the verdict of guilty; and by reason of the insufficiency thereof, whether the trial court erred in denying the

motions for acquittal and new trial?

d. Whether the trial court erred in not giving the instruction requested by petitioner pursuant to the case of *Spaeth v. United States*, 218 F.2d 361?

e. Whether the petitioner should have been acquitted and the case dismissed by reason of the purpose of entrapping him in order to predicate a charge of perjury?

3. Does the *per curiam* decision issued by the Ninth Circuit Court of Appeals give adequate consideration to such an important point of law as the petitioner's need for and right to have the "guiding hand of counsel" at all stages of the proceeding against him.

STATUTE INVOLVED

Title 18, U.S.C., § 1621:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, willfully and contrary to such oath states or subscribed any material matter which he does not believe to be true, is guilty of perjury."

SUMMARY OF FACTS AND EVIDENCE PERTINENT TO THIS PETITION

On September 18, 1968, in San Diego County, the petitioner herein appeared as required before the United States Grand Jury of San Diego, California, and he was asked

questions pertaining to a platinum transaction allegedly occurring in San Diego about May 2, 1968. At the time of the grand jury hearing, an investigation had been going on with reference to the transaction. The petitioner was a possible accused in connection therewith. Nevertheless, he was without counsel to represent him at the hearing. The grand jury transcript was introduced by the Government as an exhibit at the trial of the within matter. Later, petitioner was indicted in New York, along with others, in connection with the said transaction, and prior to the trial of this case he was convicted in New York of conspiracy to commit extortion. (R.T. 14-15.)

Although the indictment in this case referred to nineteen questions propounded and alleged perjurious answers given at the grand jury hearing (C.T. 1-4), in his opening statement to the jury the Assistant United States Attorney referred to only thirteen (R.T. 54-56).

Summarized, the evidence is as follows:

Terry A. Knowles testified for the Government: I am a special agent of the Federal Bureau of Investigation (hereinafter referred to by the initials FBI). On September 18, 1968, the petitioner (hereinafter in this summary referred to as Catalano) went into the grand jury room. At that time I was in charge of an investigation involving Catalano in connection with the loss of one hundred thousand dollars. The possible crime was fraud by wire and traveling in interstate commerce in furtherance of the fraudulent scheme. The loss was by Martin Goldman, and it occurred in San Diego on May 2, 1968. (R.T. 62-63) Witnesses called before the grand jury included Martin Goldman, Catalano, Broox Hoyt, Sandy Williams, Seymour Flax, and possibly Aaron Friedman.

(R.T. 63-64.)

Cross-Examination: I don't recall what was the information of the grand jury. I was not present at the hearing. The purpose of the investigation was to determine if a federal violation existed concerning the loss of one hundred thousand dollars in connection with an attempted purchase of platinum at San Diego by Martin Goldman on May 2, 1968. (R.T. 64-65.)

Henry Williams testified for the Government: Either late April or early May, 1968, I met Mike Mitty (identifying petitioner) in a motel in Los Angeles. He was introduced to me by Martin Goldman as "Mitty." In a washroom in a pancake house in Chula Vista, California, I received three packages from Mitty, which Goldman stated, while both were present, contained one hundred thousand dollars. I believe it was the next day after I met Mitty, but I can't get the days straight in my mind. (R.T. 66-68.) After Mitty and Goldman gave me the three packages, I sat down to meet a party who was to sell platinum to Goldman. In about five minutes, Goldman came in and said, "Follow me, the police are here." I followed him across the street and gave him back the three packages. Later that same day, at King's Motel in San Diego, Mitty and Goldman gave me the three packages again. (R.T. 68-69.) Goldman and Broox Hoyt took me down to the U. S. Grant Hotel. I stood in front to meet a party named "Juan." Juan came, and I went with him to his car in the parking lot. He opened the trunk, showed me a case, and said, "Here is the platinum." He said, "Put the money on top of the case." I did so, and he closed the trunk and drove around the block. He went to a phone booth, and then came to the car and said, "Someone is on

the phone, and they want to talk to you." He said, "If you don't get out of this car, there is no deal." I got out of the car, walked to the telephone, and there were some Spanish speaking people talking on the phone. He ran back to the car, and I followed him. He got in the driver's side and said, "Get away from the car or I'm going to kill you," and he drove off. (R.T. 69-70.) The following day, Mitty, Goldman, Hoyt and Seymour Flax went to Tijuana, Mexico, to the home of Norman Natividad, who made all of the arrangements on the purchase of platinum, and we had a meeting at his house. When we went inside, there were three guns on the floor, and Natividad said they were out chasing Juan all night but he escaped to Cuba. Mitty was standing there and went upstairs with us and was at the meeting and talked about ways he wanted to recover the money. I don't remember what he said. (R.T. 70-72.) He never fell asleep (R.T. 73). We all then drove to the San Diego Airport. There, Mitty said he and Goldman were staying on and that Seymour Flax and I were responsible for one-third each of the loss and it had to be made up within so many days or else when I walked down the street I'd better look behind me, meaning he would kill me. (Motion for mistrial and for citation of Mr. Johnson, the prosecutor, for misconduct was denied, but the portion of the testimony in regard to the killing was stricken and the jury instructed to disregard it.) (R.T. 73-74.)

Cross-Examination: In 1969 I had a number of meetings with FBI agents. On May 8, 1969, I had a conversation with Agent Laughlin and made a statement that Catalano never went to Mexico. (R.T. 75-78.) I didn't get along with Catalano at all. When he made violent threats

against me, I didn't like him. "I don't dislike him. I don't want any part of him." I don't recall stating to Goldman that I hated Catalano. (R.T. 78-80.) Seymour Flax and I proposed the purchase of platinum from Natividad. Goldman didn't know of it prior to my bringing it to his attention. I had met Natividad once before, and he created a desire in my mind to find buyers for a commission or a finder's fee. (R.T. 81.) (At the afternoon session the witness changed his testimony and said that he was to receive his commission from Goldman.) (R.T. 85.) Broox Hoyt introduced me to Natividad. Flax and I went back to New York and told Goldman about the deal, that Natividad said he had connections to get platinum if somebody would come up with a hundred thousand dollars for necessary papers and planes to take the platinum to buyers in Europe. Flax and I didn't have the money, so we went to Goldman. (R.T. 85-88.) Goldman, Flax and I and Mr. Singer, Goldman's attorney, came back to California. I don't know Hoyt's position in the transaction. (R.T. 88.) I told Mr. Laughlin that I disliked Catalano fifteen minutes after I met him. Catalano made threats and became obnoxious when I said that I wanted to go home and bow out of the deal. Catalano said I couldn't because I agreed to go through with it. (R.T. 89-90.) Natividad had stated that once a person was picked for the transaction, he had to go through with it. I was picked. (R.T. 90-91.) I have never called Mitty by the name of Catalano. (R.T. 91.) I told Agent Laughlin on May 8, 1969, that Marty Goldman gave Williams the money while both were in the washroom of the Donut Shop in Chula Vista, but I wasn't correct then. (R.T. 93.) I remember Catalano gave me one of the packages and

sticking it into my pocket. (R.T. 93-96.) Everyone in San Diego called him "Mitty." (R.T. 98.)

Broox Hoyt testified for the Government: I was introduced to Catalano by Marty Goldman in the San Diego area in late April or early May of 1968. He told me that Catalano was Mike Catty, a lifelong friend of his; that they were blood brothers; and that he was here to see that nobody got hurt. The date was May 2nd, 1968. Present were Goldman, Flax, Catalano, Williams, a fellow named Thomas (an assayer), Mr. Friedman (an uncle of Goldman), and myself. Catty said the transfer of Williams and Juan at the U. S. Grant Hotel should be done in a manner of Friedman and Catalano in the lead car, leading the car of that Juan and Williams would be in, and Goldman and I should be behind following them. (Witness related events which took place near the U. S. Grant Hotel in San Diego.) (R.T. 100-104.) Later that evening, at the King's Inn, Catty told me his real name was Catalano. (R.T. 105.) The next day I drove my car and took Williams, Flax, Catalano and maybe Friedman, and went to the house of Natividad in Tijuana. In the house, we went upstairs and talked about getting the money back. I went downstairs and talked with Mrs. Natividad and their grandchild Dolores. Catalano came down and remarked to Mrs. Natividad what a beautiful child the little girl was. During the time we were at the house, Catalano was out of my sight ten or fifteen minutes. I never saw him sleeping there. (R.T. 105-107.)

Cross-Examination: I had known Natividad four or five years. I was to receive a finder's fee of 5% from Goldman. After that evening, I saw Juan in a courtroom in San Diego in January 1969. I don't know if Goldman

ever got back his money. Williams talked to Goldman in California in person on April 28, 1968. I introduced Goldman to Natividad. My commission was for the introduction. I told Goldman that I had known Natividad four or five years. I induced Goldman to buy the platinum. To my knowledge it was a legitimate transaction. (R.T. 108-113.) Catalano outlined the plan for sandwiching Juan's car between the cars driven by Friedman and me. (R.T. 113-114.) When we arrived at Natividad's house, we all went upstairs to the second level sitting room. In about 15 or 20 minutes I went to the first level, and five minutes later Catalano came down. (R.T. 114.) I don't know what Catalano said at the meeting other than social amenities. I don't recall where he sat. I don't remember his engaging in any conversations or discussions on any subject other than social amenities. I am sure he could hear what was going on, but I don't remember where he was sitting. (R.T. 114-115.) I was indicted for conspiracy to defraud, by the federal grand jury. The attorney representing me was Jack McCabe. I didn't work out any deal with my attorney or anyone else. I pleaded guilty to a misdemeanor in connection with a scheme that resulted in a fraud. I didn't get a consideration for my favorable testimony against Catalano. I was indicted originally for a felony, and I knew that I could be sent to a federal penitentiary if I was found guilty. I pleaded guilty to a misdemeanor. Present in the courtroom at the time was Mr. Johnson from the United States Attorney, the gentleman here in the courtroom. The judge accepted my plea, but I know nothing about any agreement between Mr. Johnson and my attorney. (R.T. 115-122.) I have a license as a private detective and have been in court three or four times. I work with attorneys. My

work is interviewing witnesses and getting statements. (R.T. 122-123.) After I pleaded guilty I paid a fine of five hundred dollars. I still retain my license. (R.T. 122-126.) I was subpoenaed before the grand jury, but I didn't testify. I took the Fifth Amendment. I had conversations with Agent Knowles and Mr. Johnson the afternoon of the grand jury hearing and later with them and my attorney in Mr. Johnson's office. (R.T. 126-130.)

Aaron Friedman testified for the Government: In April or May, 1968, I met a man known as Mike (the petitioner) at Los Angeles Airport. I wasn't told his name. My nephew is Marty Goldman. Three days later, Marty, Mike and I went in my car to San Diego. The day before, Mike put a package in my pocket and said it was forty thousand dollars. The day we went to Chula Vista I gave it to him at a parking lot of a restaurant in Chula Vista. While we were at the Hotel Hilton in Mission Bay (San Diego), I had no conversation with Mike but did with Sandy Williams. After we left the restaurant in Chula Vista we went to the King's Inn in San Diego. I had no conversation in which Mike took part. Later that evening I drove Mike downtown. He got out of my car, went somewhere, then came back to my car and said, "I lost him. Go around the block." (R.T. 131-135.)

Recross-Examination of Broox Hoyt: I told Agent Knowles in March of 1969 that I was not certain of the individual's last name as being "Catty" but it was very similar. He asked me if it was "Mitty" or "Catty," and I said it sounded like "Catty." (R.T. 137-138.)

Cross-Examination of Aaron Friedman: I met a man called Mike in Los Angeles for the first time. He was introduced to me by my nephew. I was with him an hour and a

half after I picked him up at the airport, together with my nephew. There was no discussion about platinum nor was the word "platinum" used. I saw Catalano the next day at the Sheraton Wilshire Hotel in Los Angeles, about 12:30 - 1:00 o'clock and was with him and Goldman from the time we left there and went to San Diego until 10:45 or 11:00 o'clock that night. I was with Goldman and Catalano continuously except when we went from King's Hotel to downtown San Diego. On the ride to San Diego there was no discussion about platinum. Catalano was asleep in the back seat. I never heard "platinum" used except by my nephew in my home after he arrived. Catalano was not in town. I never heard the word "platinum" used when Mike was present. (R.T. 139-144.) If there was ever a discussion when a plan was formulated as to how the parties were to conduct themselves at the U. S. Grant Hotel, I didn't pay any attention. I wasn't involved other than driving a car. I don't recall Hoyt mentioning the plan. Catalano, I believe, was in the room, but I don't believe he made any contribution to what was going on. Mike said something to Marty about the deal stinks. (R.T. 144-146.)

The Government then rested, and the petitioner made a motion for acquittal, outside the presence of the jury. After argument by counsel (R.T. 148-151), the motion was denied on all grounds (R.T. 151). Counsel for petitioner then made an opening statement to the jury. (R.T. 151-153.)

Defense Testimony:

Arthur Singer testified for the defense: I am an attorney licensed to practice in New York. I have represented Martin Goldman and have known him ten or twelve years before

April-May, 1968. I came to California in April-May, 1968, at Goldman's request. I saw Catalano on May 1st at the Sheraton Wilshire Hotel in Los Angeles in the presence of Goldman. I saw Catalano the next day. I don't think there was any discussion when Catalano was present regarding platinum. (R.T. 153-156.)

Cross-Examination: I have never known Catalano by any other name. I was introduced to him as Michael Catalano. (R.T. 156-157.)

Martin Goldman testified for the defense: I am a bottler and distributor of soft drinks. In April-May, 1968, I was a manufacturer of automotive accessories and different products. I knew Catalano four or five years previously and considered him a friend. I was introduced to Henry Williams, nickname of Sandy Williams, by Seymour Flax at Flax's office about the second week of April, 1968. They explained a deal to me, and they needed one hundred thousand dollars. Sandy said it was a definite deal and he had met the principals, but he didn't tell me who they were. They didn't tell me they were representing Natividad. They said they had met a broker in California who told them if they had enough money to buy platinum, he would see to it that they received the platinum and would engineer the deal. The price would be one-half the price on the open market. Two days later they told me they had contacted Broox Hoyt and had told him what we had spoken about, that we wanted to deal directly with the principals. If we were interested, we would raise the necessary funds. Sandy took me to a man in the platinum business, and he told me he was interested in all we could get and would be a steady purchaser. Sandy and Flax said that we could not meet the principals unless we had a certified check

or cash, so my father and I raised the money. I left for California the last day of April or first day of May to meet the broker and have him take us to the principal. (R.T. 158-164.) I arrived at the Sheraton Wilshire with Williams and Flax and met Hoyt. They told me we were to go to Tijuana, meet the principal, show the check, and sign the contract. A couple of days later, in California, I talked to Catalano. Catalano was requested by me to come to California after we found out it was a cash transaction and not a certified check. This change was made after a meeting was had with Natividad in Tijuana. (R.T. 164-167.) Hoyt, Flax, Sandy and I had a meeting after that at the King's Inn in San Diego. Hoyt told me that he had heard that Natividad was an honest man and was the only one who could deliver platinum. I told Sandy that if it was going to be cash, I wanted to call New York and have one of my friends with me. Sandy made a couple of calls to have someone with him, but when he couldn't, I offered to call for someone, and then I called Mike at his home in Manhattan. I asked him to get a plane and come out. He arrived about two or three days after I arrived. During that period of time, I continued to have meetings with Hoyt, Flax and Williams. Mr. Singer helped me to get to the bank to convert the certified check to cash. (R.T. 167-171.) When Catalano arrived, my uncle and I picked him up at the airport and drove him to the hotel. There was no conversation regarding the platinum transaction. Catalano had nothing to do with the conversations with Flax and Williams about platinum. He had nothing to do with the deal and was not my partner. Flax and Williams were my partners. (R.T. 171-172.) Between the time Catalano arrived in and left from

California, he had no gun or weapon. After he arrived, I mentioned money and said that it was a lot of money and I would feel better if someone were with me that I knew and trusted. Flax had been a business associate for a year, and I had only just met Williams through Flax. Hoyt I didn't know at all. I felt safer with Catalano present. (R.T. 172-174.) At the first meeting, Sandy became enraged when he heard Mike say he didn't like it, after Mike overheard the arrangements about the money being put on Sandy. Sandy jumped on the bed and pushed Mike's arm away and said, "We have worked on this for quite some time, and you don't know anything about what we are doing. So, where do you come off to offer an opinion?" Mike asked me to step out of the room, and he said, "Let's go home." The deal was between Flax, Williams and myself, and we weren't listening to anybody. Singer suggested that we go home, when he felt there wasn't any contract to be written up. Sandy, Flax and I made the decisions, and we listened to Hoyt. After that confrontation, Williams and Catalano didn't get along. Sandy said, "Get that guy away from me or we don't make any deal." We had an incident in Chula Vista when the police took our names and searched my uncle's car. (R.T. 174-177.) During our stay at the Sheraton Hotel, when Catalano was present, no mention was made of platinum. I never told Catalano that I was going to buy platinum. I told him that the reason I called him was because we had a hundred thousand dollars in cash and if he was near he could help us. He was not my bodyguard and had never been my bodyguard or worked as such. (R.T. 177-178.) Whenever I introduced him to Williams, Flax, Hoyt or my uncle, I gave his name as "Mike Catalano." I

never introduced him as Mike Mitty or Michael Catty or any similar name. (R.T. 178-180.) I never heard anyone call him Mr. Mitty or Mr. Catty. Williams and Hoyt called him Mike, mostly. (R.T. 181.)

Catalano went to Tijuana on the final encounter. I don't think he was introduced to Natividad. (R.T. 181-182.) While Catalano was in Los Angeles there was no discussion with him or while he was present about platinum, nor when Friedman drove us to San Diego. In San Diego, the money transaction was discussed when Catalano was present but not platinum. All that I explained to Catalano was that it was a business venture which required cash. (R.T. 182-183.)

On the occasion in the washroom, I gave the money to Williams, and he had it in his possession for twenty minutes. After that we went to the King's Inn, and calls and a meeting took place. Hoyt and I got on the phone with Natividad, and Hoyt then stated the plan as to the exchange of the cash and the platinum. Catalano and my uncle never engaged in any conversations regarding the transaction. I don't know whether they were present in the room or not. (R.T. 184-187.) (The witness testified as to the events at the U. S. Grant Hotel and the plan, and that Catalano went to the hotel with his uncle, while he went with Hoyt.) (R.T. 187-188.) The next time I saw Sandy was when he was brought back to the hotel. Sandy said he was thrown out of the car, that the man grabbed the three packages and drove away. Up to that time Catalano never threatened Williams. (R.T. 188.) The next morning, Flax, Williams, Hoyt, myself and Catalano went to Natividad's house. He had three guns there before, but this time they were not there. Hoyt, Sandy and I went upstairs and talked to Natividad. With Natividad was a man by the

name of Blevins, who Natividad said was his partner. Catalano was not my partner nor was he to receive any gain from the transaction. He had no right to know my business or why I was down there. At the meeting, only the principals--Natividad, Blevins, Williams, Flax and myself--were there. There were no non-principals. I don't know whether they came up or stayed down. The only conversation was with Natividad, Sandy and myself. Catalano never made any oral contribution to anyone at that time other than social amenities. I didn't see Catalano handle or play with or pick up a little girl, or participate in any way with her or Mrs. Natividad. When I came downstairs, I saw Mike in the living room lying on the couch with his head back. I can't remember seeing Hoyt there. (R.T. 188-192.)

We left the house and took Mike to the San Diego Airport. He got on a plane and left. Before he left he did not have a conversation with Williams that he was holding Williams to one-third of the loss and Flax to one-third, or that he, Williams, had better keep looking over his shoulder. I don't think there was a confrontation or disagreement between Williams and Catalano at the airport. We were thankful Sandy was alive. (R.T. 192-193.)

Catalano had nothing to do with the platinum transaction. When we were driving around in the San Diego-Tijuana area, whenever Catalano could sleep, he would rest back and sleep. As soon as I called him, he rushed to the plane and didn't get any sleep. Everything was happening at one time, and there wasn't too much time to sleep. (R.T. 194.) Catalano was a New Yorker. He didn't drive in San Diego or know where he was. When we went to Tijuana, he was with us when we walked in the door. The next time I saw him was

when I was coming down from the meeting. He was on the couch with his head back. I never saw him talking to anybody at the house. (R.T. 194-196.) He came to California at my request to act as a sort of bodyguard in case someone tried to steal the money. I never told him I wanted him to be my bodyguard, or arm, or needed someone to exert force in case of a fist fights, etc. (R.T. 196-197.) In 1968, he never used any other name than Michael Catalano, and the only one I ever heard call him anything other than Mike is the wife when she's mad at him. I never heard him give any name other than Mike, Mike Catalano. I never had a conversation with Broox Hoyt about a finder's fee or commission, or remitting any moneys for the platinum transaction. My partners were Flax and Williams only. Catalano was not a partner. (R.T. 203-204.)

Cross-Examination: I never introduced Catalano by any other name; never referred to him as Mike Mitty or by a similar name. I had him come to San Diego because I wanted somebody with me I could trust in handling the money. I couldn't plan that he was going to handle the money; the plans were already made. Sandy had made the arrangements. I requested him to go downtown, San Diego, on May 2nd. We had set up two cars and Catalano and my uncle were to be in one car and Hoyt and myself in the other. My uncle's car was to be in front. Catalano would have to know what he was to do. The only thing that was said was that if we had Juan in view, everything would be fine; go right back to the hotel and follow the rest of the plan. We never assumed Juan would leave the convoy. Sandy deviated from the plan and didn't wait for the car. He walked away from the front of the Grant Hotel, and we couldn't

get to him fast enough. By the time we circled around, he was gone and we lost the money. We complained to the police much later. (R.T. 204-209.) My father and I borrowed from Commercial Trading Co. to get the money, and we have paid half of it back. Catalano had no interest in the company. My father bought Catalano's ticket to California. (R.T. 209-211.) The money was carried from the bank in three packages. I had one, Mike had one, and my uncle had one. The plan was to have Williams have the money at the eating place. At the place, I had the packages and gave them to Sandy in the men's room of the restaurant. (The witness described the original plan about meeting the man with the platinum.) (R.T. 211-214.) The sale of the platinum was to be completed in Europe or a free port. It was the idea of me and my partners that Sandy was to hand the money to Juan. The decision was made by the three of us, at the suggestion of Natividad at his house. Natividad made the suggestion and I made the decision, and we all agreed. (R.T. 214-218.)

All I ever discussed with Catalano was the money. When I met him at the airport, he asked me what was happening. When I mentioned the metal deal, he said, "I don't know anything about that. What do you want me to do?" and that is as far as I can remember ever mentioning the proposition or discussing the metals with Mike. I told him the money was for the purchase of metal. (R.T. 218-220.) The next morning after the loss, Mike went to Tijuana with us. I don't remember his being at the meeting or introducing him. I only remember coming downstairs with Sandy in front of me, and I saw Mike with his head back, and I said, "Come on, Mike." He got up and we walked out. I don't remember seeing the other men

there, other than Blevins (Carpenter), Natividad, and our group. I didn't notice three guns. They were gone. (R.T. 220-222.) After refreshing my recollection of my statement to FBI Agent McKinley, I remember seeing three semi-machine guns there at the bottom of the stairs. (R.T. 223-224.) After we left Natividad's house, we went to the airport for Mike. We all went to his house. I don't think I asked Mike if he wanted to go. (R.T. 225-226.)

(In chambers a discussion took place as to whether the prosecutor would ask a question, i.e., whether or not the witness had been convicted of a felony, when the judgment of conviction was not yet final on appeal. The court ruled that the question could be asked. Counsel for defendant, in the light of the court's ruling, then requested permission to ask the question himself. [R.T. 226-232].)

Redirect Examination. As a result of my transaction and agreement with Williams, I was convicted of a felony, conspiracy for trying to get the money back from Williams, his portion. The case is presently on appeal. (R.T. 232.)

(It was stipulated that the case was conspiracy to commit extortion, trying to get money back by the use of fear, force, etc. [R.T. 232-233].)

Michael Vincent Catalano testified in his own behalf. In April-May, 1968, I was unemployed due to injury as a truck and trailer driver. I am married, with four children, two of them presently in college. I served in the U. S. Service in World War II for three years, was decorated and honorably discharged. I was born and raised in New York and prior to

April or May, 1968, was never in San Diego. (R.T. 232-235.) I have been a friend of Goldman for four or five years. I have never been a bodyguard for him or carried a gun for him or engaged in any kind of strong-arm tactics for him or anyone he knew. It was just a friendly relationship. At his request I arrived in Los Angeles. I had been awake during the late hours in New York prior to arriving in Los Angeles. I tried to sleep on the plane. I met Flax and Williams late that night. When I met Goldman, I said, "Are you in trouble?" He said, "No." I said, "What am I doing here?" He started to mention something, and I said I was not interested in what he was doing. He stated that there was a great sum of money to carry after cashing a check, and he felt I would be of some use to him, being near, or he would gain some confidence by me being by him. From there on I was never in any discussion. I never cared to discuss anything they were doing. It was none of my affair. The only service he said he wanted of me was to be with him when he cashed the check and got the money. (R.T. 235-239.) From the time I arrived in Los Angeles until I went home from San Diego, I never carried a weapon of any kind. I am not a bodyguard or do any bodyguarding. (R.T. 239.)

Flax and Williams came into the hotel room in Los Angeles and Marty introduced them. Williams started to tell me about the moneys he was going to carry, and Marty was to give him the money, and he was going to be playing in the middle. I told Marty that it didn't sound right and we should go home. Williams got excited and said, "Who are you? You just come here and you are making decisions." I ignored him and got up from my chair. Williams was "ejaculating," jumped on the bed. (R.T. 239-241.)

Before the grand jury I was asked questions and the answers were true (referring to the first three questions and answers [Nos. 1 to 3; C.T. p. 1, l. 30 to p. 2, l. 7]). When I was in San Diego, I rode around with Goldman. I was never in the vicinity before in my life. I didn't drive in San Diego. I didn't know the town. I know now where we stayed from what I hear in the testimony, but I had no idea where we were. I tried to sleep most of the time, and my answer was the truth. (R.T. 241-243.)

Question and answer No. 4 (C.T. p. 2, ll. 10-13): I didn't know that any of the people I was involved with had anything to do with platinum, and I didn't care. Nobody told me I was involved in platinum. "If they did, I would walk away. I don't know nothing, I don't see nothing." No one mentioned platinum or the platinum transaction. (R.T. 243.)

Question and answer No. 5 (C.T. p. 2, ll. 14-16): My answer was the truth. Goldman asked me to come out here and have me with him. He hadn't asked me to participate in the exchange of money for platinum or in any way to be involved in any type of sales with platinum or do anything in relation to any platinum. I came here because Goldman asked me to. He felt better if I was near him, or whatever confidence he drew by my presence near him. (R.T. 243-244.)

Question and answer No. 6 (C.T. p. 2, ll. 17-19): My answer was true. (R.T. 245.)

Question and answer No. 7 (C.T. p. 2, ll. 20-21): My answer was true. I remember that I stayed at a one-level, street-level affair. So it probably was a motel. I didn't know the name of it. (R.T. 245.)

Question and answer No. 8 (C.T. p. 2, ll. 22-23): When I was at the motel, I didn't get any visitors. Nobody came to

see me. I don't see why anybody had business with me there, or anything I had a participation in, anything directly to that. (R.T. 245-246.)

Questions and answers No. 9 and No. 10 (C.T. p. 2, ll. 26-27): I had never before been to Tijuana. I think Broox Hoyt was the driver on that occasion. I don't know the names of any streets in Tijuana. I would only guess and travel south to get there. (R.T. 246-247.)

Question and answer No. 11 (C.T. p. 2, l. 30 to p. 3, l. 3): My answer was the truth. When we arrived at Tijuana, I remember stepping out of the car; I was in the rear section of the car. I remember walking into an archway outside the house, into a door that led into the house. There was a small vestibule and to my right a small room that had a couch and possibly a chair and table. To my left, I believe, there was a sort of semicircular stairway going to the upper level. These people with me took the stairway and went up. I, at the tail end, went to the right. I sat down on this couch. I might have smoked a cigarette, and I leaned back and dozed off. Other than my injury, I wasn't suffering from sleeping sickness. From the time I received the telephone call from Goldman there wasn't much time for sleep, people jumping all over the place. I'm not interested in that. I wanted to get a catnap–five, ten minutes, a half an hour. (R.T. 247-248.)

I was convicted in 1959 of theft from an interstate shipment and went to jail for six months; in 1970, for conspiracy to commit extortion, arising out of Sandy Williams trial to retrieve the money. It is on appeal. (R.T. 248-249.)

Question and answer No. 12 (C.T. p. 3, ll. 6-7): I gave the answer that I didn't talk to anybody in the house. There was a pretty little girl. I said something to her before I fell

asleep. She smiled, said, "Thank you," or something, and ran back. (R.T. 249-250.)

Question and answer No. 13 (C.T. p. 3, ll. 10-15): My answer was the truth. (R.T. 250-251.)

Question and answer No. 14 (C.T. p. 3, ll. 18-19): My answer was the truth. Assuming Mr. Johnson was referring to platinum discussions, I didn't engage in any discussions in San Diego concerning platinum. (R.T. 251-252.)

Questions and answers No. 15, No. 16 and No. 17 (C.T. p. 3, ll. 22-29): When I arrived in California, I was introduced to Williams and Flax by Goldman as Mike Catalano. He never introduced me by the name of Mr. Mitty, Mr. Catty, or Catty, Mitty, or anything like that. Williams never called me Mr. Mitty. I don't recall his calling me Mr. Catalano or Mike or anything else. Hoyt never called me by any name other than Mike Catalano or Mike. (R.T. 252-253.) In my relationship with Goldman we never discussed anything about gains. He asked me to come down, and I came down. He didn't offer to pay for my trip, and I never asked him for money for the trip. The ticket could have been purchased by his father. I am not sure who paid my ticket home. (R.T. 253-254.) During recess I called Mr. Busby's attention to the fact that I was arrested and convicted of possession of a weapon by a felon, when I was arrested on the charge connected with Williams. That case is on appeal. (R.T. 255.)

Cross-Examination: I can't recall who paid for my ticket, Goldman or his father, nor who paid for my ticket back. (R.T. 256-257.) When I arrived in Los Angeles, Goldman started to tell me about the transaction, and I cut him short. He said there was a transaction for money and he would feel more comfortable if I was with him. I wasn't

interested. He wanted me to be with him, and I was there. He never told me he wanted me to protect the money. He never used the word "protection." He mentioned something about metal when we first landed, and I cut him short. I said, "I don't want to know about anything," and said, "What am I doing here?" He said, "I have a transaction going on here that requires a great deal of money. I feel better that you are here, and you can stay with me." I interrupted him when he mentioned "metals." (R.T. 257-260) I was downtown in San Diego the night the money was stolen. I was in a car with Friedman, Marty's uncle, and was where I could observe Williams in front of the hotel. There was a conversation before we went downtown. (Witness related the plan of the transaction–the word "platinum" not being mentioned.) (R.T. 260-262.) The only part I knew at the motel was that the money was to be transferred if certain factors, or whatever they were involved in, met their specifications. Using three vehicles was not my idea. The instructions were not specific. I was only interested in the money. I knew it was going to be on Williams, and I had to keep him in sight. I was interested in seeing that the money was not mishandled. From the seat I was in in the car I could keep him in vision. (R.T. 262-263.) (Witness related that he saw the meeting take place between Williams and the other man, and then they went around the corner. The car in which Catalano was riding went around the hotel, but they did not see Williams and the other man any more.) (R.T. 263-265.)

When we left Los Angeles, we did not go directly to Chula Vista. We were along the bay somewhere in San Diego and waited for fifteen or twenty minutes. Then they drove

to a motel–this one-floor-level place. Present at the motel were Friedman, myself, Goldman, Williams, Hoyt and Flax. I didn't have a room, but two adjoining rooms were chosen, opening to each other. I didn't stay at the motel that night but stayed in the vicinity where you can walk around palm trees, etc. I did a couple of times and tried to get some sleep in a sitting area outside the room. After the money was lost we went to the same motel, and it was a mass of confusion. The loss took place at night, but I don't remember the time. (R.T. 265-266.) I may have sat on a bed. I didn't have a specific bed, but there were beds in the rooms. (R.T. 268.) I saw the big man who met Williams, and I saw another man besides those I was with, a fellow who had equipment with him. I don't know his name. (R.T. 268-269.)

The next day after I arrived in Los Angeles, I went to the bank with Goldman and his attorney, Singer, but waited outside when they went in. Then we had to go to another bank where the funds were exchanged for the check. The money was placed in three packages. Goldman took the money, and Singer left. Goldman and I took a cab back to the hotel. Goldman's uncle was to drive Goldman and me to San Diego, and a package was taken by each one. I may have given one of the packages to Friedman. After we arrived at a motel in San Diego, Goldman had all the money before we went to the restaurant in Chula Vista. The money disappeared the same night we were in Chula Vista. (R.T. 269-272.) The next morning about 5:00 or 6:00 o'clock we all went to Tijuana. All interest I had in the monetary matter was gone. I went to Tijuana because it was important for Goldman doing whatever they had to in Tijuana about getting the

money back. I went to be with Goldman. I testified before the grand jury that I didn't want to go. I stated that it was my desire to go home. I had to go because they asked me to take a ride. My own desire was to take a plane and go home. I had to go to Tijuana because they decided to take a ride to Tijuana. I had no transportation other than the vehicle that was going to Tijuana. (R.T. 272-277.)

They drove to a house. I didn't see any machine guns or other guns there. I didn't talk to Natividad there, nor, I think, to a woman. I talked to a pretty little girl. I wasn't introduced to anybody. After leaving the house, we went to the airport. (R.T. 278.) I didn't tell Williams at the airport that he was responsible for thirty-three hundred dollars and he'd better look behind him, or anything similar. (R.T. 278-279.)

I saw Goldman in New York the following week, and he told me he lost a hundred thousand dollars. I learned that the metal was platinum from the investigations when I was indicted. On the flight coming from the East to the grand jury, that word was used by an agent. It so read in the indictment. I don't know the agent's name. I sat next to Goldman, and he sat next to me on the plane. The word "platinum" could have been mentioned by another agent who met us at the airport. It was before I went to the grand jury. I knew before I went in that there was a business venture in a large sum of money in platinum. (R.T. 279-282.) The answers I gave at the grand jury were answers relating to the time about the last week in April or beginning of May in 1968. When I entered the grand jury, I gave answers relating back to the time when I first came to California, four, five or six months prior to my coming

to the grand jury. (R.T. 282.) I knew before I entered the grand jury that the word "platinum" was involved in some kind of transaction with the money that was lost. (R.T. 282-283.)

Redirect Examination: In September, 1968, it was still a little hazy, and I knew platinum was involved. When Mr. Johnson began to ask questions regarding the transaction, the questions were in relationship to April and May of 1968. He never asked me when I found out, or whether I knew when I arrived in San Diego that it was platinum. (R.T. 283.) When Mr. Johnson asked me the question, "Did you travel to San Diego in connection with Mr. Goldman's platinum transaction?" I answered, "No, sir." I believe he was questioning me in point of time of the latter part of April and first week in May. At that time I did not know I was traveling to California for a platinum transaction. I found that out in September of 1968 in the hall here in the grand jury. All of the questions of Mr. Johnson refer to April and May of 1968, and that is when I didn't know it was regarding platinum. He never asked me when I found out. He asked me if I knew if I traveled to the West Coast in connection with a platinum deal around the end of April or beginning of May, and I answered no, I did not know. (R.T. 283-285.) Mr. Johnson never asked me when I found out about the platinum transaction. All questions he asked me were in point of time referring to April and May of 1968. He didn't ask any questions as to whether or not in September I knew that the people I met back in April or May were involved with platinum. (R.T. 285-286.)

A motion was made for acquittal, outside the presence of

the jury, but it was denied. (R.T. 287.) The judge stated that he would not give the instruction based on the *Spaeth* case. (R.T. 291-294.)

REASONS FOR GRANTING THE WRIT

I

The Constitutional Rights Of Petitioner Were Violated Under The Fifth And Sixth Amendments, United States Constitution, Because He Was Not Permitted To Have An Attorney Present In The Grand Jury Room While He Was Being Interrogated.

It is Hornbook law that the privilege against self-incrimination extends to all judicial or official hearings where persons may be called upon to give testimony, even to civil proceedings. Griswold, *The Fifth Amendment Today* (1966); Morgan, *Basic Problems of Evidence*, 145-158,(1962).

If it is clear that the privilege applies in investigations, it is equally clear that an untrained layman is ill equipped in an appearance before a grand jury to ascertain when he may claim the privilege and when his answer would support a conviction or "furnish a link in the chain of evidence needed to prosecute the claimant for a crime." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 914.

Thus, the problem facing a witness before a grand jury, who is there without the presence of his attorney and thereby having to shift for himself, is one full of peril. The admissions of a party before a grand jury are admissible against him, or may be used to impeach his testimony, and certainly and most

clearly may result in an indictment for perjury or contempt.

In the landmark case of *Escobedo v. Illinois* 378 U.S. 478, 486 (1964), this Court clearly recognized the need for the assistance of counsel by one suspected or accused of a crime. The Court said:

> "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation. *Powell v. Alabama*, 277 U.S. 45 . . . . What happened at this interrogation could certainly 'affect the whole trial.' *Hamilton v. Alabama*, 368 U.S. 52 . . . . "

The same must be said of the need for counsel before the grand jury.

The facts of *Escobedo* are instructive in that they make it plain that the precepts of a case are not satisfied simply by giving a client some general advice and then letting him "go it alone." Prior to the police interrogation which produced his damaging admission, Escobedo had had the benefit of counsel. It was conceded in *Escobedo* that:

> "There is testimony in the record that petitioner and his lawyer had previously discussed what petitioner should do in the event of interrogation." (378 U.S. at 485.)

We submit that counsel, in advising his client how to react in the face of possible future interrogation, can never anticipate every possible question and every conceivable accusation that may be put to his client. The argument, then, reduces itself to the proposition that not only should an accused or suspect be made aware of his rights but he is entitled to be advised at every step of interrogation concerning whether or not to respond. The mere presence of counsel outside a grand jury

room and away from the proceedings does not guarantee this right, because a witness before a grand jury may not accurately and adequately repeat the questions being asked him, and unless the witness were to leave the grand jury room after every question, the over-all context of the grand jury inquiry certainly would be lost to counsel outside the room.

The very facts of *Escobedo* negate the usual contention of the prosecution that general advice by counsel is an adequate substitute for his continued presence. So, also, does the language of the Supreme Court in *Massiah v. United States*, 377 U.S. 201 (1964), wherein the Court denounced incriminating statements which had been obtained from Massiah in the absence of counsel after Massiah had been indicted.

Usually, the prime suspect in a crime of violence is taken to the police station for interrogation. The prime suspect of a "white-collar crime," such as mail fraud, tax evasion, etc., much more frequently is called before a grand jury. Thus, requiring counsel for a "suspect" in a grand jury room hardly constitutes a radical extension of *Escobedo*. The logic of *Escobedo* would seem to require the application of its safeguards to grand jury proceedings and other investigatory proceedings, the purposes of which are to determine possible guilt. Before a grand jury, a witness's privilege is more complicated than in police interrogations, for he can legally be compelled to answer non-incriminatory questions and will be held to have waived his privilege if he answers incriminatory ones. As dissenting Justice Black pointed out, joined by Justices Frankfurter and Douglas, in *Rogers v. United States*, 378 U.S. at 486:

> ". . . [T]oday's holding creates this dilemma for witnesses [before a grand jury]: On the one hand,

> they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it."

If, as Justice Frankfurter put it in *Griffin v. Illinois*, 351 U.S. 12, 23 (1956), "law addresses itself to actualities," counsel should be allowed in the grand jury room. Resolution of the scope of the privilege against self-incrimination and the applicability of the waiver doctrine on a question-by-question basis raises issues which are difficult and complex. Recognizing the traditional approach of the grand jury, it is nonetheless difficult to reconcile that procedure with the Fifth Amendment's guarantee that "no person shall be compelled in any criminal case to be a witness against himself." Like a trial, a grand jury investigation of a crime is "a criminal case" at which incriminating questions need not be answered. *Councilman v. Hitchcock*, 142 U.S. 547 (1892). At a trial, putting the accused on the witness stand without his consent and asking him anything at all would violate his constitutional privilege against self-incrimination. Mere interrogation before a grand jury may harm the accused as much as mere interrogation at a trial. His manner and voice may arouse suspicion. If he refuses to answer questions that are not incriminating, he may be guilty of contempt. He must weigh every question and exercise his judgment with respect to whether the particular question warrants his exercise of the privilege. A flat warning to remain silent in the grand jury room cannot suffice to protect his rights. If the continued presence and constant advice of

counsel is needed to effectuate the privilege against self-incrimination in the interrogation room, it obviously is necessary in the grand jury room.

This Court has not, so far as we have been able to ascertain, passed specifically on the issue that a possible accused has the right to have an attorney present while he is being interrogated before a grand jury. However, the trend of decisions with respect to having counsel present would indicate that one who may even remotely be subject to prosecution in the matter being investigated should be represented by counsel at all stages of the proceeding against him. *Escobedo v. Illinois, supra; Massiah v. United States, supra.* After *Escobedo* and *Massiah,* the Court held that a defendant is entitled to the services of an attorney at a pre-trial lineup identification. *United States v. Wade,* 388 U.S. 218; *Gilbert v. California,* 388 U.S. 263; *Stovall v. Denno,* 388 U.S. 293.

In the recent case of *People v. Martin,* 2 Cal.3d 822, the viewing of a defendant through a one-way mirror in the police station by an identification witness, a victim of a robbery, was held to be a violation of the principles enunciated in *Wade* and *Gilbert,* because the defendant was not represented by counsel–such viewing being regarded by the California Supreme Court as a "critical stage."

In the instant case, at the commencement of the hearing before the grand jury, the Assistant United States Attorney stated:

> "Q [By Mr. Johnson] Mr. Catalano, before you - - you probably know you are before the Grand Jury, San Diego, California, and I will advise you that we are investigating the matter of

alleged fraud by wire in which reportedly one hundred thousand dollars was stolen from Mr. Goldman and his associates.

"However, I'll say that - - give you the routine advice concerning your rights. That you don't have to say anything that may tend to incriminate you. Anything you do say could be used against you. You have the right to have an attorney advise you. He can't come inside the Grand Jury, but he could advise you; and if you could not afford an attorney, you would have the right to have one appointed by the Court without expense to you before you were questioned. However, since you are not the subject of this investigation, the subjects are the people who are believed to have committed the fraud. Do you understand me?

"A Yes, sir.

"Q And are you willing to testify today?

"A Whatever I can tell you."

Nevertheless, questions were asked at the hearing which required Mr. Catalano to incriminate himself, and he was later indicted in New York in connection with alleged conspiracy for extortion arising out of or connected with events about which he was interrogated before the grand jury.

An examination of the grand jury transcript shows that a number of questions were interspersed among innocuous ones to such an extent that only a legally trained mind would be able to determine—and then only with great difficulty—which questions required assertion of the privilege against self-incrimination and which were not incriminating. Certainly,

anyone like Mr. Catalano–who clearly appeared to be unversed in legal technicalities, as well as having a limited understanding of what was going on–would be unable to determine the self-incriminating elements of the questions propounded. As we shall point out later in this petition, this man also misunderstood the meaning or interpretation of many of the questions asked, including several pertaining to the perjury charged. Only by having his own counsel present at the grand jury hearing could he have been adequately protected in the matter.

We submit, therefore, that the absence of counsel for Catalano when Catalano was actually being interrogated before the grand jury violated his rights of due process, the right against self-incrimination and the right to be represented by counsel as guaranteed him by the Fifth and Sixth Amendments.

II

The Decision Of The Ninth Circuit Court Of Appeals Conflicts With Decisions Of Other Federal Courts With Respect To The Following Questions Raised Below, And The Decision, We Contend, Is Inadequate By Reason Of The Court Below Disposing Of These Questions Merely By Stating "we find the testimony was material" And "[w]e find other points raised without merit."

a. Whether the trial court was in error in instructing the jury that all questions asked of petitioner at the grand jury hearing were material but in not instructing it which questions pertained to the charges of falsity.

In the instant case the trial court gave instructions that all questions and answers before the grand jury were material (R.T. 344) but did not instruct the jury which should be disregarded by the jury in determining the charges of falsity. As noted, the Court of Appeals has found only that "we find the testimony was material" (see appendix).

This Court, in *Debrow v. United States*, 346 U.S. 374, at page 376, stated:

> "The essential elements of the crime of perjury as defined in 18 U.S.C. § 1621 are (1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement *wilfully made as to facts material to the hearing.*" (Emphasis added.)

In federal courts the issue of materiality of the alleged perjury is for the court to determine and not for the jury, it being essential that the answer be material to the inquiry. *United States v. Edmondson*, 410 F.2d 670; *Sinclair v. United States*, 279 U.S. 263; *Brooks v. United States*, 253 F.2d 365; *Blackman v. United States*, 108 F.2d 572; *Luse v. United States* (9th Cir.) 49 F.2d 241; *United States v. Siegel*, 263 F.2d 530; *United States v. Zborowski*, 271 F.2d 661; *United States v. Alu*, 246 F.2d 29.

In the indictment there are 17 questions the answers to which are alleged to be perjurious. Clearly, some of them are not material, and the court should have instructed the jury to disregard them in rendering its verdict. As the record stands, we are unable to determine what questions and answers were passed on by the jury in rendering the verdict. It is conceivable that, although the court instructed the jury that it had to be unanimous on its verdict of guilty on at least one of

the questions and answers, the jury might have been unanimous on one or more of these questions and answers that were not "*material to the hearing.*"

We find no solace in the Court of Appeals' determination, "we find the testimony was material," for, as we urged in our Petition For Rehearing, we are left with the unanswered questions: "What testimony?" "How was it material?"

As pointed out in the cases above cited, it is required that the prosecution must prove the materiality of the questions asked and for the court to determine the materiality of the questions as affecting the purpose of the grand jury investigation. Although the indictment in the instant case set forth 17 questions and answers (C.T. 1-3), the concluding paragraph charged only eight perjurious answers (C.T. 3-4). The trial court read to the jury the indictment *in toto* and then erroneously instructed the jury that "the questions asked the accused before the Grand Jury constituted material matter in the Grand Jury proceeding described in the indictment" (R.T. 344). The court then instructed the jury that the indictment alleged eight false statements and that the Government need prove only one to be false, but that the jury must be unanimous on any one particular statement it found to be false.

Because of the uncertainty and ambiguity existing between the seventeen questions and answers and the eight alleged perjurious statements referred to in the last paragraph of the indictment, no determination can be made as to which statement or statements the jury found to be perjurious. Furthermore, it is error to determine, as a matter of law, when no showing was made by the Government, that all

questions were material. Some of them clearly were not; yet petitioner has been placed in the position of having to examine each question and dispute its materiality, not knowing, under the broad instruction of the trial court, which ones the jury considered.

In our Summary of Facts and Evidence, *supra* (pp. 22 through 24), we have endeavored to set forth the testimony of Catalano with reference to the 17 questions and answers. The eight alleged perjurious answers will be classified herein under the letters (a) through (h) for convenience in discussion (a portion of said answers will be covered at a later point in this petition).

Answer (b) alleged to be perjurious was, we contend, immaterial and was possibly given in response to questions Nos. 3, 4, 8 and 11, wherein Mr. Catalano stated that he was asleep most of the time. In partial response to No. 4 Mr. Catalano stated, "I was asleep most of the time, *like I am now*" (emphasis added), indicating that he was sleepy and not fully awake all the time. In any event, whether he was asleep a great deal of the time or was awake part of the time was immaterial. The evidence showed that Catalano arrived in San Diego late in the afternoon of one day and left early on the plane the next morning, so that whether he slept a good deal of the time or not was certainly immaterial.

Answer (d). Respecting answer (d), it is charged that Catalano did not fall asleep on a couch in Tijuana. Again, the lack of materiality is obvious.

Answer (h). Respecting answer (h), it is charged that it was not true that Catalano did not use another name than Mike or Michael Catalano in 1968. This is not a case where one is using an alias to commit other crimes, as for example fraud, forgery, etc., nor is it a situation where the use of a

name other than one's own is important to an investigation. The use of any other name than his own among those with whom Mr. Catalano was with in Los Angeles or San Diego was wholly immaterial.

If the jury found unanimously against Catalano on any of the above answers, then his conviction should have been reversed. In that connection it is to be noted that Catalano, Goldman and Broox Hoyt had already been indicted in New York for conspiracy to commit extortion against Sandy Williams, and that all of them had been witnesses before the grand jury in this case, along with Seymour Flax. There was, therefore, nothing in the answers of Catalano calculated to impede the investigation, for the grand jury in San Diego was already aware of all of the facts. Consequently, so far as Catalano was concerned, his statements were not material to the investigation, nor did they have any tendency to affect the ultimate action of the grand jury.

In the case of *La Rocca v. United States*, 337 F.2d 39, at page 43, the court stated:

> "The governing criterion that is recognized by this Circuit concerning the relevancy or materiality of the alleged false testimony to the purpose of the grand jury's investigation is whether or not the perjurious statements impede and hamper the course of the investigation in the sense that it has a tendency to affect the ultimate action of the grand jury. (Citing cases.)"

Based upon the above criterion, we submit that none of the alleged false statements were material, and certainly not the three above mentioned, for they were not calculated in any way to impede and affect the investigation.

b. Whether the trial court was in error in not requiring the jury to find specifically which statements of petitioner it found to be perjurious.

While the court rightly instructed the jury that it must agree upon the statement or statements found to have been false, the court did not require the jury to specify which statement or statements it found to be false. It is therefore impossible to determine if the jury found one or more to be false which was immaterial or one or more in which the evidence was insufficient.

There is an indication that the jurors disagreed upon the finding of falsity on some of the charges, for, while the jury was deliberating, it sent a note to the court as follows:

> "Your Honor, to deliver a verdict of guilty, must we, the jury, concur unanimously on one or more charges in the indictment, i.e., meaning the same charge?" (R.T. 349.)

The trial court attempted to clarify its previous instruction by instructing the jury that all must agree on one or more of the statements (R.T. 351-352). The court still neglected to have the jury advise which statement or statements all of them agreed upon, and this is the vice of the instruction. Without such determination as to what particular statement the jury found to be false, Mr. Catalano is handicapped in attacking the verdict of guilty, either on the ground of immateriality or insufficiency of the evidence.

It is to be noted that a considerable portion of the prosecutor's argument was directed to the answers of Catalano that he slept most of the time in San Diego and on the couch in Tijuana (R.T. 301-302), and the answers

with respect to using a name other than his own, to wit, names which might be even considered nicknames, such as Mitty or Catty (short for Catalano). In fact, the prosecutor even emphasized the other name allegedly used, by referring to Mr. Catalano as Mr. Mitty (R.T. 308-309).

In the case of *Gebhard v. United States* (9th Cir.) 422 F.2d 281, the court stated, at page 288:

> "Further it was not error for the judge to divide the counts into those provable under the two-witness rule, and those that could be established by circumstantial evidence. Had the trial judge left that task to the jury, neither we nor the trial judge would have any way of knowing which counts were decided on circumstantial evidence, and which were decided under the two-witness rule. It might well have been error not to separate the charges."

Since the jury was not instructed by the court *sua sponte* to find or specifically state which answers were perjurious, especially after the jury returned for further instructions, so as to afford petitioner an opportunity to attack the particular finding, petitioner was denied a fair trial and due process.

c. Whether the evidence was sufficient to support the verdict of guilty; and by reason of the insufficiency thereof, whether the trial court erred in denying the motions for acquittal and new trial.

We have pointed out above that the alleged false statements were not material to the grand jury investigation and

that it was error to determine, when no showing was made, that all questions were material and to so instruct the jury. Additionally, the evidence was insufficient to support the verdict on any of the alleged false statements.

As we have stated previously, since the trial court erroneously failed to require specific findings as to which statement or statements were found to be false, we are in the unenviable position of having to attack the verdict as to all of the alleged false statements, not knowing whether on some of them the jury found for the petitioner. Before doing so, we would like to review some of the factors or matters to be considered in determining whether an alleged false statement was wilfully or corruptly made.

In *La Rocca v. United States, supra,* the court held that the government must prove that the defendant knowingly and wilfully made a false statement on a material matter. The court stated (337 F.2d at 43):

> "The degree of proof required of the government to establish these elements has been defined as 'substantial evidence excluding every other hypothesis than that of guilt.' See *Blumenfield v. United States,* 306 F.2d 892, 897 (8th Cir. 1962) and cases therein cited. Stated differently, but to the same effect, 'to sustain a conviction, it must be shown by clear, convincing and direct evidence to a moral certainty and beyond a reasonable doubt that the defendant committed wilful and corrupt perjury.' *Smith v. United States,* 169 F.2d 118, 121 . . . ; *Beckanstin v. United States,* 232 F.2d 1 . . . . "

In the case of *Van Liew v. United States,* 320 F.2d 674, the oft-quoted rule is stated:

> "A charge of perjury may not be sustained by the device of lifting a statement of the accused out of its immediate context and thus giving it a meaning wholly different than that which its context clearly shows. (Citing cases.)"

Accord: *Fotie v. United States,* 137 F.2d 831.

The *Van Liew* court also held that the government must prove that the defendant knowingly and intentionally swore to a falsehood and its proof must exclude every other hypothesis than that defendant purposely misstated a fact knowing it to be false or untrue.

In *United States v. Rose,* 215 F.2d 617, the court held that, to sustain a conviction of perjury, the burden is on the government to establish by substantial evidence, excluding every other hypothesis than that of guilt, the essential elements of the crime charged. The court stated (215 F.2d at 622):

> "Perjury is the willful, knowing and corrupt giving, under oath, of false testimony material to the issue or point of inquiry. An essential element is that the defendant must have acted with criminal intent–he must have believed that what he swore to was false and he must have had the intent to deceive. If there was a lack of consciousness of the nature of the statement made or it was inadvertently made or there was a mistake of the import, there was no corrupt motive."

The court held that a false statement which is the result of an honest mistake is not perjury, and that in determining the existence of perjury, language used by individuals must be considered in the light of their educational, intellectual and

environmental background. Accord. *Beckanstin v. United States*, 232 F.2d 1, 4.

In the well-reasoned case of *United States v. Wall*, 371 F.2d 398, the court held that a person may not be convicted if his answer is literally accurate, technically responsive or legally truthful.

In *Fotie v. United States, supra*, the court held that deliberate material falsification constitutes the crime of perjury; that there must be proof that the testimony charged to be perjurious was false, that the defendant did not believe it; and that such proof must be established by two witnesses, or by one witness corroborated by circumstances. See cases cited therein; also, *Weiler v. United States*, 323 U.S. 606.

With the above principles in mind, we now examine the eight alleged perjurious statements, which we submit were not made wilfully, corruptly, with intent to deceive or to impede the grand jury investigation. In doing so, we shall refer to the statements in the order they appear in the indictment, using the letters (a) to (h).

First we must consider that the defendant was a truck and trailer driver, and from his demeanor and answers we must conclude that he was a person of limited education and intellect. It also appears that he was not in full control of his mental faculties due to loss of sleep; as he put it, "I was asleep most of the time, like I am now."

(a) Mr. Catalano stated that he did not travel to San Diego in connection with Mr. Goldman's platinum transaction. That statement was "literally accurate, technically responsive and legally truthful" (*United States v. Wall, supra*). The statement is erroneously taken out of context, as he testified before

the grand jury why he went to San Diego–that there was a transaction involving money and a package of some metal (G.J.Tr. p. 22, ll. 11-18). He also testified that Goldman called him to come down, and he did so to keep Goldman company (G.J.Tr. p. 4, l. 21 to p. 5, l. 1, ll. 13-16). At the trial, both Goldman and Catalano testified that the word "platinum" was never mentioned, and that Goldman asked Catalano to come West, without specifying the reason. When Catalano arrived, he cut Goldman short when the latter started to tell him of a metals transaction, "platinum" not being mentioned. Both testified that because it was a large cash transaction of some sort–not disclosed to Catalano as to the nature of the same–Goldman said he wanted Catalano with him because he wanted someone he could trust.

The Government based its case against Catalano primarily upon the testimony of Sandy Williams, the man who initiated the platinum transaction. Williams was the one who induced Goldman to obtain a hundred thousand dollars, the one who–by his deviation from the plan agreed upon between Goldman, Flax and Williams–caused the loss, the one who was the instigator of the felony proceeding in New York against Goldman and Catalano, and the procurer of their conviction on conspiracy to commit extortion. It seems incredible that Goldman (the one who suffered the loss) and his friend Catalano end up convicted of felonies, when the real culprit, Sandy Williams, goes scott free; and the Government's action in the matter seems without justification.

In any event, a careful scrutiny of Williams' testimony fails to disclose any mention of the word "platinum" with respect to Catalano but refers only to the money involved in some transaction. The same applies to the testimony

of Broox Hoyt-who was apparently indicted in New York along with Goldman and Catalano for the felony but, in consideration for his cooperating with the Government to secure their conviction and assisting the Government in the instant case to convict Catalano, Hoyt was permitted to plead *nolo contendere* and was punished by a fine only.

Thus, when Catalano answered, "No," when he was asked if he went to San Diego in connection with Goldman's "platinum" transaction, he was "literally accurate, technically responsive and legally truthful," meaning that he went to San Diego on some money transaction involving some "metal." Goldman, Friedman (a Government witness) and Catalano all testified that Catalano never engaged in conversations regarding the "platinum" transaction.

The evidence, then, falls short of establishing perjury as to that statement, especially when Catalano explained to the grand jury that he did not go to San Diego on a "platinum" transaction. At the trial of the instant matter, Catalano repeatedly said that he did not know the parties were involved in a "platinum" transaction and that no one mentioned platinum. (R.T. 243-244, 251, 258-260.) He testified on cross-examination that he learned that the metal involved was platinum after he was indicted. He was told so by an agent who accompanied him on the plane West to the grand jury hearing. When he was questioned before the grand jury in September of 1968, he gave answers relating back to the time when he came to California four or five months before. The prosecutor, Mr. Johnson, never asked him at the hearing when he found out that platinum was involved or whether, when he was in San Diego previously, he then knew it was platinum. He believed Mr. Johnson was questioning him in point of time of the

latter part of April or beginning of May, 1968. At that time he did not know that "platinum" was involved. (R.T. 280-286.)

(b) The answer of Catalano that he slept most of the time was not only not material but it was not legally untrue. He testified that he slept whenever he could get a nap, because he had left for California and had been without sleep. He slept in the car; he slept outside in the vicinity of the motel; he slept on a couch downstairs in the house in Tijuana. Thus, his answer was not wilfully and knowingly false.

(c) Catalano's answer that he did not meet one or more others in regard to the "platinum" transaction was literally accurate, technically responsive and legally true, for he believed his answer related not to the time he was testifying before the grand jury but to the time of the transaction. He met others in connection with a money transaction, not knowing that platinum was involved. As pointed out above, not a single witness testified that platinum ever was mentioned to Catalano or that platinum was mentioned in his presence.

(d) Catalano's testimony that he fell asleep on a couch in the house in Tijuana was corroborated in part by Goldman. Williams testified that Catalano never fell asleep, but Williams disliked Catalano and was doing everything he could to cause him trouble. Hoyt testified that he never saw Catalano sleeping there, but Williams also stated that Catalano was out of his sight for fifteen minutes at the house in Tijuana. Conceivably, Catalano could have slept during that time. However, that answer was certainly not material to the investigation.

(e) Catalano's statement that he never talked to anyone at the house in Tijuana was not knowingly false or corrupt. Undoubtedly, Catalano construed the question to be directed toward some material conversation, not a passing "hello" to a pretty little girl. Furthermore, a passing incident like that could have been overlooked or forgotten under the stress of the interrogation before the grand jury. Only one witness, Broox Hoyt, testified that Catalano talked to anyone, and his testimony was to the effect that Catalano talked to the grandmother of the little girl and that Catalano had merely remarked what a beautiful child the little girl was. No other witness testified as to the alleged conversation with Mrs. Natividad. Goldman testified that he did not see Hoyt there. In any event, it was a passing remark of Catalano, and it could have been forgotten by him. Certainly, it was not material to the investigation, and it is difficult to understand how it could be ballooned into "talk," or a "discussion," as contemplated by the question of the United States Attorney.

(f) There was no evidence that Catalano lied when he said he did not come to California to act as a sort of "bodyguard" to Goldman. Webster defines "bodyguard" as "a guard to protect or defend a person." The question and answer must be deemed to have been based on the normal and correct interpretation and meaning of the term "bodyguard." Both Catalano and Goldman testified that Catalano came West at Goldman's request, without knowing the purpose of his trip. Goldman told Catalano when he arrived that there was a pending transaction involving a large sum of money and he, Goldman, would feel better if there was someone around

whom he knew and could trust in connection with the money. There was no indication that Goldman was in danger and needed protection, for Goldman apparently was among friends and business associates. In fact, during all of the activities, there was not the slightest intimation by any witness that Goldman was ever in personal danger or in need of personal protection or a bodyguard for himself. Thus, Catalano's answer was "literally accurate, technically responsive and legally truthful," so that the charge of perjury cannot be established as to that statement.

(g) Finally, the charge that Catalano's statement that he did not use any other name than "Mike" or "Michael Catalano" was false and perjurious was not only immaterial but was not corrupt, was not intended to deceive, or was not impeding the grand jury investigation. Goldman, Friedman and Catalano all stated that Catalano was introduced by his name, not by the names "Mitty" or "Catty." Williams, the real culprit–and tool of the prosecution, was the only one who testified that the names "Mitty" and "Catty" were used. Even the Government witness Hoyt, who was given leniency in the felony prosecution, testified that the name "Mike Catty" was used when he was introduced to Catalano by Goldman (R.T. 101) but, on cross-examination, testified that he told Agent Knowles that he was not certain of the individual's last name as being "Catty" but it sounded similar, but that it was not "Mitty." It is possible that Catalano's name being Italian, neither Hoyt nor Williams grasped the pronunciation correctly. It is to be noted that except when prompted otherwise by Mr. Johnson, all witnesses mostly used the name "Mike" when referring to Catalano.

A motion was made for acquittal at the close of the Government's case, but it was denied (R.T. 148-151). The motion for acquittal was also made at the conclusion of the trial, but it was again denied (R.T. 287). After the verdict, the motion for acquittal was again made notwithstanding the verdict, and also a motion for new trial (R.T. 355), but they were denied (R.T. 366). Thus, the Court of Appeal could consider the evidence and determine whether or not there was sufficient evidence to support the verdict and whether the motions for acquittal or for new trial should have been granted. It can only be assumed, since the decision does not mention the evidence or the sufficiency thereof, that the Ninth Circuit Court of Appeals' statement "[w]e find other points raised without merit" refers to this point.

d. Whether the trial court erred in not giving the instruction requested by petitioner pursuant to the case of *Spaeth v. United States*, 218 F.2d 361.

In *Beckanstin v. United States, supra,* the case of *Spaeth v. United States, supra,* was cited with respect to the evidence required to convict for perjury. In the instant case, petitioner's counsel requested an instruction based on *Spaeth,* but the trial court refused. It was submitted to the Court of Appeal that this was reversible error.

e. Whether the petitioner should have been acquitted and the case dismissed by reason of the purpose of entrapping him in order to predicate a charge of perjury.

We have indicated above that the petitioner had already

been indicted in New York before he was subpoenaed before the grand jury in San Diego. The FBI and the United States Attorney's office already had all the information required, so that Catalano was no longer simply a witness. Hoyt had received leniency, ostensibly to cooperate with the prosecution. Sandy Williams had already furnished the information to the Government, or at least enough to cause the Government to indict Goldman, Hoyt and Catalano in New York. At the commencement of the hearing, Mr. Johnson advised Catalano that he was not the subject of the investigation (G.J.Tr. p. 3; see pp. 33, 34, *supra.*)

The purpose of compelling Catalano to testify was either to get him to incriminate himself in connection with the New York indictment or to entrap him into giving incorrect answers to lay a foundation for the charge of perjury. The tenor of the charges on immaterial matters bears out this contention.

It has been held that where the purpose of interrogation is for the purpose of laying a predicate for a perjury indictment, the grand jury is not a competent tribunal. *Brown v. United States,* 245 F.2d 549; *United States v. Icardi,* 140 F. Supp. 383; *United States v. Thayor,* 214 F.Supp. 929.

We contended in the appellate court, and contend here, that, in the instant case, the whole attitude of the Attorney General's office was to "get" Catalano in every possible way, since it filed three indictments against him—two in New York and this one in California—while at the same time letting the instigators of the platinum transaction, Hoyt and Williams, go free. This is certainly not dispensing justice nor in accordance with the principles of *Krulewitch v. United States,* 336 U.S. 440.

III

Does The *Per Curiam* Decision Issued By The Ninth Circuit Court Of Appeals Give Adequate Consideration To Such An Important Point Of Law As The Petitioner's Need For And Right To Have The "Guiding Hand Of Counsel" At All Stages Of The Proceeding Against Him.

The petitioner respectfully urged in his opening brief before the Ninth Circuit Court of Appeals and in his Petition For Rehearing, and again urges, that he was entitled to have an attorney appear with him before the grand jury at the time he was questioned before said body and the groundwork laid for the return of an indictment against him for perjury. The Court of Appeals, in passing on this point, disposed of this contention with the language:

> "The point about counsel before the grand jury is well settled adverse to Catalano."

We are not unmindful that for years this practice has been followed. But in recent years the courts have not hesitated to change many of these old practices, and we contend that today, in light of modern decisions, where the corner policeman is compelled to advise a suspect of his constitutional rights, including the right to the presence of an attorney–even at the state's expense if the suspect is unable to afford one, certainly, in a case of this sort, where the groundwork is being laid for a charge of perjury against an individual, the suspect is entitled to have counsel present with him in any appearance before a grand jury. What better case could we possibly cite than the present one to urge the necessity for abandonment of the old rule and the establish-

ment of a new practice, consistent with modern law, permitting the guidance of an attorney at hand where he can assess the value of the testimony before the grand jury, the nature of the questions asked, and the damage resulting if answered. Surely the rule must be changed. The law now holding that a man is entitled to the advice of an attorney and his guidance "at all stages of the proceeding" is now well settled. *Miranda v. Arizona,* 384 U.S. 436; *Escobedo v. Illinois,* 378 U.S. 478 (1964); *Gideon v. Wainwright,* 372 U.S. 335 (1963).

Repeatedly, the courts have reversed long-standing positions after careful consideration and re-examination of the constitutional issues involved. One of the best examples is the noted California case of *People v. Cahan,* 44 Cal.2d 434, where the law regarding search and seizure which had been in effect in California for more than half a century was reversed in no uncertain terms.

As this Court succinctly pointed out in *Miranda:*

> "Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us and it is our responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."

CONCLUSION

It is respectfully urged that in order to secure to

petitioner those rights guaranteed to him by the United States Constitution, the requested writ of certiorari should be granted.

Respectfully submitted,

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